83-459

NO.

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether federal regulation of the non-Indian ocean salmon fishery off the coast of Washington which necessarily provides the Washington coastal treaty tribes a harvest of much more than 50% of the harvestable fish which would otherwise return to the tribes' usual and accustomed fishing grounds is in violation of the non-Indians' treaty right, as established by this court, to at least 50% of the harvest and/or federal statutory requirements requiring fair and equitable allocation of harvest.

2. Whether federal regulation of the non-Indian ocean salmon fishery off the coast of Washington which admittedly causes tremendous loss of ocean harvest and concomitant large transfers of salmon harvest to foreign fisheries violates the preeminent, "optimum yield" requirements of the federal Fisheries Conservation and Management Act of

1976 ("FCMA"), 16 U.S.C. § 1801, et seq.

3. To the extent, if any, that Indian treaty fishing rights are found to be inconsistent with the requirements of the FCMA, whether the treaties must be deemed modified as necessary to eliminate such inconsistency while preserving the Indian treaty fishermen's right to up to 50% of the harvest.

PARTIES

The parties to the proceeding in the Court of Appeals for the Ninth Circuit, whose judgment is sought to be reviewed, are the following:

Petitioner:	Washington State Charterboat Association (Plaintiff-Appellant)
Respondent:	Malcolm Baldrige, Secretary of Commerce (Defendant-Appellee)

In addition, the following appeared as Amici Curiae:

Quinault Indian Nation
Hoh Indian Tribe
Quileute Indian Tribe

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JURISDICTION

The jurisdiction of the Court to review the judgment entered by the Ninth Circuit Court of Appeals on March 29, 1983, rehearing denied on June 9, 1983, is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

Treaty of Olympia, July 1, 1855, Jan. 25, 1856, United States-Quinault and Quileute Indian Tribes, 12 Stat. 971:

> Article III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the

purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. . . . .

Fisheries Conservation and Management Act (in pertinent parts):

16 U.S.C. § 1801(b)(3), (4):

(3) To promote domestic, commercial and recreational fishing under sound conservation and management principles;

(4) To provide for the preparation and implementation, in accordance with national standards, of a fishery management plan which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.

16 U.S.C. § 1851(a)(1), (4):

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

. . .

(4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign privileges among various United States fishermen, such allocation shall be: (a) fair

and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner than no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1802(18):

> The term "optimum," with respect to the yield from a fishery, means the amount of fish--
>
> (A) Which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities; and
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> (B) Which is prescribed as such on the basis of the maximum sustainable yield from such fishery as modified by any relevant economic, social, or ecological factor.

STATEMENT OF THE CASE

This case was originally heard in United States District Court for the Western District of Washington. Proper jurisdiction for the District Court as the court of first instance in this case is provided by 28 U.S.C. § 2201 and 16 U.S.C. § 1855(d).

The petitioner, Washington State

Charterboat Association (hereinafter "Association") consists of approximately 350 individuals representing most Washington citizens who operate ocean charter offices and vessels engaged in the ocean recreational fishing industry. Association members are primarily located in the Washington fishing ports of Westport, Ilwaco, LaPush, Neah Bay, and Port Angeles. The vast majority of the ocean sports fishery in Washington and the economic vitality of many coastal communities is dependent upon the charterboat industry.

In modern times the majority of the recreational salmon harvest in Washington State has occurred off the coast of Washington. The harvest in this sports fishery consists of stocks emanating from rivers throughout the Northwest states and British Columbia. A relatively small portion of this harvest has been from salmon stocks emanating from the streams of the north

Washington coastal area. These north coastal streams are usual and accustomed fishing grounds for three tribes, the Hoh, the Quileute, and the Quinault, with each of these tribes having coterminous treaty rights generally throughout the many river systems of the north Washington coastal region.

Fishing from 3 to 200 miles off the coast of Washington is regulated by the Secretary of Commerce ("Secretary") pursuant to the federal Fisheries Conservation and Management Act of 1976 ("FCMA"), 16 U.S.C. § 1801, et seq. The primary issue in this case is what allocation format must be used by the Secretary to divide harvest of coastal stocks between the Indian and non-Indian fisheries in order to comply with the requirements of the FCMA and the Indian treaty fishing rights. The issue is not whether the tribes should be allowed to harvest 50% of the available fish, but rather

how this allocation should be accomplished.

The Association believes that the unique characteristics of the ocean salmon fishery, which make it completely distinct from terminal area fisheries such as those dealt with by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (hereinafter "Fishing Vessel"), impose important limitations on management measures which can be utilized to comply with both the FCMA standards and treaty fishing rights. Allocation formats which often work to provide both Indian and non-Indian fishermen a "fair share" of the resource in terminal area fisheries simply cannot provide this result when applied in the unique circumstances of the mixed-stock ocean fishery off the Washington coast.

The primary distinction between the ocean fishery and terminal area fisheries

dealt with in Fishing Vessel is that the ocean fishery is a mixed stock fishery comprised of many different species of salmon and many different runs[1] of each species. While some limited "targeting" among species is possible, generally ocean fishermen cannot predetermine which specie or run of fish they will catch and, even when caught, can still not determine the river of origin. In contrast, the terminal fisheries dealt with in Fishing Vessel occurred largely near or in river mouths where the various runs are substantially separated as they prepare to return to spawn. Targeting harvest is far more effective in this terminal area situation.

Since non-Indian net fisheries along the Washington coast are, for sound biological reasons, prohibited by state law imple-

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[1]A "run" of fish is a group of anadromous fish on their return migration for spawning which is identified by species, race and water of origin (and return).

menting international and interstate agreements (RCW 75.12.200-.260), and are also largely impractical given weather conditions and lack of safe harbors, the ocean fishery is limited to a hook-and-line fishery which only produces harvests of chinook, coho, and pink salmon. Coastal species such as sockeye salmon, chum salmon, and steelhead trout, which are not caught on a hook-and-line fishery, are, therefore, harvested almost exclusively by treaty Indian, in-river net fisheries. Again, this presents a sharp contrast to the terminal area situation reviewed in Fishing Vessel, since most terminal area harvest in that case occurred in Washington's internal waters where both Indian and non-Indian net fishing is legal, thus allowing a sharing of harvest on all species returning to the streams in the Puget Sound area and Strait of Juan de Fuca area.

The coastal, in-river fishery is

nearly exclusively an Indian net fishery since, with the exception of very inefficient, non-Indian river sports fisheries which harvest only a small percentage of some of the coastal runs, harvestable returns to coastal streams are only available to Indian net fishermen. Again, the "nonbiting" species are not available for a hook-and-line, non-Indian, in-river fishery. Furthermore, many of the largest coastal runs are essentially contained within the boundaries of the tribal reservations and thus are not available for non-Indian fishing. The remoteness and inaccessibility of many of the Washington coastal streams is also a severe limitation to non-Indian, in-river harvest.

Thus, once various coastal stocks have escaped from the mixed stock ocean fishery, they are essentially only available to Indian treaty harvest which harvest occurs mostly by way of an in-river net fishery.

Completely unlike the situation in Fishing Vessel, the non-Indian fishery simply has no opportunity to harvest several of the coastal stocks due to biological and legal limitations. Thus "equal" or "fair" sharing of each run of coastal stocks subject to the treaty right is impossible.

Given the nature of the mixed stock ocean fishery, and the distinction between ocean versus terminal area fisheries for non-Indian and Indian fishermen, respectively, various treaty allocation schemes to achieve 50% treaty/nontreaty sharing produce widely varying levels of actual harvest sharing, ocean harvest, and transfer of harvests to other fisheries, including foreign fisheries. The allocation format required by the courts below is a run-by-run allocation with ocean harvest levels managed as necessary to provide a return to each coastal tribe's fishery of 50% of the harvestable

numbers (numbers above those needed for proper spawning escapement) of <u>each run</u> returning to any of the treaty area streams.

While this 50% sharing of each run would be ideal, because of the mixed-stock nature of ocean fishery as described above, there is, unfortunately, no way to manage the non-Indian ocean fishery so that 50% of harvestable numbers of each run subject to the treaty right returns to each tribe's in-river net fishery. Instead, the courts below have required that 50% of the weakest run be allowed to return to the tribal fishery. This results in more than 50% of the harvestable numbers of all other, stronger "biting" coastal runs returning to the coastal streams for tribal harvest, and, of course, a return of all of the non-biting species.

Since the ocean, mixed stock fishery involves a large number of different runs

from different regions of origin, some of which are strong and some of which are weak, and since coastal stocks cannot be segregated during ocean harvest, all ocean fishing must stop when non-Indian harvest of the weakest coastal stock has reached 50% of the harvestable numbers of that stock. Because of this, all other coastal stocks, which could otherwise support additional non-Indian harvest, are allowed to escape to the tribe's in-river net fisheries at levels greater than 50% of their harvestable numbers.[2] Successful application of this run-by-run management scheme guarantees, therefore, that the treaty tribes will have an opportunity to harvest more than 50% of all coastal treaty runs but the weakest.

Not only does run-by-run management of this type totally eliminate the oppor-

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[2]As set forth above, nearly all of the nonbiting coastal stocks will escape to the coastal streams for harvest by treaty Indian fishermen.

tunity of non-Indians to harvest 50% of the coastal stocks subject to the treaty rights, but it severely reduces the harvest on other, much stronger stocks which are not subject to the treaty obligations. Since the vast majority of the ocean harvest is not from coastal stocks, an early closure to provide a harvestable return of 50% of the weakest stock to the in-river Indian treaty fishery prevents much larger harvests on stronger stocks with other regions of origin. Due to the highly migratory nature of salmon, a very substantial number of these salmon lost to the ocean fishery migrate into Puget Sound and Canadian fisheries for harvest.

The impact of run-by-run management on overall harvest sharing and non-Indian harvest levels can be seen by a review of the results of the 1980 and 1981 ocean salmon fishery off the Washington coast. For these years (prior to the court decisions the

Association petitions this Court to review), the Secretary adopted a different, less impacting, allocation format as a basis of his management regulations. A "single species, regional aggregate" approach, designed to return at least 50% of the harvestable numbers of each species to the "aggregated" or "regionalized" coastal river systems involved in this case, was utilized. Thus, instead of a requirement to return at least 50% of the harvestable numbers of the weakest run anywhere in the coastal river systems, the Secretary attempted to provide a return of at least 50% of the harvestable numbers of the weakest species to the north Washington coastal region rivers as a whole.[3]

As a result of application of this approach by the Secretary in 1980, the

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[3]While, as compared to the run-by-run approach, this system offered some additional flexibility and ability to equalize harvests, it again insured the treaty Indians would harvest over 50% of all species but the weakest.

coastal tribes harvested 50% of the coho, 70% of the chinook, 80% of the chum[4] and 100% of the sockeye salmon which would otherwise have returned to the coastal streams. The treaty tribes' share of the total harvest of salmon stocks emanating from the coastal rivers was 62% in 1980 and 64% in 1981. These percentages do not include the steelhead trout harvests for which Indian harvest proportions were substantially greater. They would have been substantially greater had run-by-run management been adopted by the Secretary in these years.

A more direct indication of the likely effect of run-by-run allocation in a mixed stock ocean fishery situation is presented by the 1981 season. As admitted by the Secretary, and the amici tribes, changing

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[4]While chum salmon does not bite on hook and line, and thus was not harvested by non-Indian ocean or in-river fisheries, it is harvested within Grays Harbor, the sole coastal non-Indian net fishery.

the Secretary's single species, regional aggregate approach to run-by-run management in the 1981 season would have required the coho quota off the coast of Washington to be reduced from 620,000 fish to 260,000 fish.[5] Thus, in order to provide the Hoh River the additional 1,150 coho necessary to allow a 50% tribal coho harvest on that stream in 1981, a reduction in the non-Indian ocean harvest of 360,000 coho and corresponding thousands of other species would have been required.[6] Had this occurred, the disparity in favor of treaty Indian harvest would have been far greater than the 64/36 ratio which

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[5]This was part of the relief requested by the tribes when they challenged the Secretary's 1981 regulations in Hoh v. Baldrige, 522 F. Supp. 683 (W. D. Wash. 1981).

[6]This reduction would have been required in spite of the fact that, even at the Secretary's 620,000 coho quota level, the Hoh Tribe would have received well in excess of 50% of the total harvest of treaty fish returning to the Hoh River.

actually occurred under the Secretary's plan.

In addition to the transfers of harvest to coastal Indian fisheries, these reductions in ocean harvest caused by application of run-by-run management cause tremendous transfers of harvest from the ocean fishery to other domestic and foreign fisheries. The record in this case demonstrates that the 360,000 coho reduction which would have occurred in the 1981 ocean fishery due to application of the run-by-run approach would have resulted in an additional transfer of coho harvest to Canadian fisheries of approximately 40,000 coho.[7] Still greater numbers would have been transferred to the Puget Sound fishery by this

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[7]The Secretary's single species, regional aggregate approach had already caused a similar level of coho transfer to Canadian fisheries when compared to an aggregation format which aggregated among species in order to maximize harvest while still allowing a 50% tribal harvest and appropriate escapements. Also, unquantified transfers of other species to the Canadian harvest would have occurred.

change.

The allocation approach advocated by the Association is that of a regional, species aggregate system. This approach would adopt a flexible ocean management scheme designed to return enough harvestable fish to the coastal streams so that each coastal Indian fishery could harvest 50% of the overall harvestable fish (by weight, number, or commercial value) subject to its treaty rights. If, for example, large transfers to the Canadian fishery could be avoided by allowing the non-Indian fishery to catch more than the 50% of certain coastal coho runs, this allocation scheme would allow a greater than 50% treaty Indian harvest of some other runs or species to offset that deficit. While each tribe would not harvest 50% of each run returning to its usual and accustomed places of fishing, it would be able to harvest 50% of the total fish so

returning.[8] Such an allocation system would protect the treaty rights of the non-Indians to up to 50% of the resource, while also protecting the non-Indians' right to 50% of the harvest and preventing massive transfer of harvest to foreign fisheries.

The critical need for a different management approach can be clearly demonstrated on more than a legal rights basis. The progressively more restrictive ocean harvest regulation of the non-Indian fishery by the Secretary has led to very dramatically declining harvests by ocean recreational fishermen as well as a declining participation of such fishermen in the fishery. Compared to five-year averages for the period preceding initiation of federal regulation under the FCMA, recreational

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[8]Past harvest statistics clearly demonstrate that 50% aggregate harvests by each tribe could be accomplished using this approach without disrupting present, place-specific fishing patterns.

angler effort, that is, participation of sportsmen in the fishery, has declined from 482,000 angler trips in 1971-75 to 206,000 angler trips in 1982, a 57% decline. Declines in harvest are even more dramatic. Recreational chinook and coho harvest has steadily declined each year from approximately 777,000 for the 1971-75 average to less than 300,000 in 1982, a 61% decline. The season duration has also sharply declined from an average of 201 fishing days in 1971-75 to a 1982 season for Ilwaco fishermen of 44 days and a Westport season of 83 days. Harvest limits of three fish have been reduced to two fish.[9]

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[9]The declines in ocean harvest levels are clearly the result of federal regulation rather than any general decline in resource abundance. These regulations are causing a transfer of harvest away from those industries the Secretary was required by the FCMA to promote and into other fisheries, including foreign fisheries. While the harvest of non-Indian ocean fisheries has plummeted, and in spite of weak coastal runs, the coastal tribes in-river harvest has gone up some 43% and 35% above its 1971-75 levels in 1980 and 1981, respectively. The tribal

The effect of these changes has been devasting to the ocean recreational salmon fishing industry. Sixty percent of the Washington charterboat fleet has gone out of operation since 1977. Tremendous impacts on the economy of the local communities such as Westport and Ilwaco have occurred and impacts to the tourism industry throughout the state

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ocean fishery has increased much more. Furthermore, unlike the Puget Sound situation dealt with in U.S. v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), these increases do not result because the coastal tribes had been essentially frozen out of a substantial share of the harvest prior to that decision. Not only have the Indian coastal fisheries traditionally harvested a substantial portion of the coho and chinook salmon, they have harvested nearly all the sockeye and chum salmon runs on the north coastal streams as well as the vast majority of steelhead trout which is also a species subject to Indian treaty fishing rights.

The Puget Sound commercial fishermen have also benefited greatly from these transfers out of the ocean sports fishery. The commercial net fishery harvest of chinook and coho in Puget Sound increased by approximately 52% or 1.5 million fish.

have been substantial. The industry simply will not be able to withstand even several more years of run-by-run allocation of the coastal salmon stocks.

ARGUMENT

This case presents a situation where the Ninth Circuit Court of Appeals has decided an extremely important issue of federal law which has not been, but should be, settled by this Court. Furthermore, the Court of Appeals has decided this case in a manner which would render meaningless certain fundamental treaty rights of non-Indian fishermen which have previously been confirmed by this Court. As such, an important conflict with applicable decisions of this Court results from the judgment below.

This Court has not previously reviewed the critical and complex legal issues surrounding the relationship between Indian treaty fishing rights and the FCMA's

statutory standards pursuant to which the Secretary is required to regulate the ocean salmon fishery off the coast of Washington. At the time of the seminal U.S. v. Washington decision, 384 F. Supp. 312 (W.D. Wash. 1974), the FCMA was not yet enacted. While the FCMA was mentioned in this Court's review of U.S. v. Washington in Fishing Vessel (443 U.S. at 688), this was only in the context of the existence of a duty to manage the ocean to assure compliance with the treaties. There was no discussion or analysis of what management measures would be required to assure that the Secretary met his obligations under both the Indian treaties and the FCMA. There was also no consideration of the special circumstances of the mixed stock ocean fishery and how these circumstances affect the management necessary to assure "fair share" allocation of harvest between Indian and non-Indian fishermen.

The proper resolution of the issues regarding the relationship between the Secretary's obligations under the FCMA and the Indian treaty rights is crucial to the citizens of the State of Washington. Since, as set forth above, the management measures undertaken to meet these obligations[10] have dramatically different impacts on the non-Indian fisheries, the very existence of the non-Indian ocean sports fishery is dependent on how these issues are resolved (as is the existence of the non-Indian ocean commercial salmon fishery). Such resolution will, therefore, have a resounding impact on the socio-economic fabric of Washington's coastal communities, the Washington sports fishing community, and the Washington tourism industry. In light of their extreme importance, these critical issues deserve, and

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[10]As will be set forth below, prior decisions of this Court make it clear that treaty obligations can be met by management formats other than run-by-run allocation.

require, consideration by this Court.

The other important reason for granting review in this case is that the courts below have taken an improper view of this Court's decision in Fishing Vessel, a view which, if allowed to stand, would totally emasculate the treaty rights of non-Indians to a fair share of the harvest as set forth in Fishing Vessel. By its failure to properly interpret this Court's decision in Fishing Vessel, the Ninth Circuit has required a fishery allocation format which ensures that the non-Indian fishery can never harvest anything close to its fair share of the coastal salmon runs subject to the Indian treaty rights. By its inappropriate reliance on isolated portions of the opinion in Fishing Vessel, the Ninth Circuit has thus guaranteed that the non-Indians treaty right to at least 50% of the harvest on those stocks cannot be attained unless this Court

grants review and reverses the decision below.

A. The Decisions Below Ignore the Fundamental "Fair Share" Principle of Treaty Fish Allocation Enunciated by this Court.

Article III of the Treaty of Olympia, concluded between the United States and the Quinault and Quileute tribes in 1856, provides as follows:

> Article III. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries, and pasturing their horses on all open and unclaimed lands. . . .

Treaty of Olympia, July 1, 1855, Jan. 25, 1856, United States-Quinault and Quileute Indian Tribes, 12 Stat. 971.

In arriving at its conclusion that the Treaty of Olympia requires the Secretary to manage the ocean fishery to pro-

vide run-by-run allocation of coastal fish stocks,[11] the Ninth Circuit relied nearly

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[11]It is not entirely clear whether the Ninth Circuit considers run-by-run allocation to be an absolute rule. At various portions of its opinion, the court states that the run-by-run approach is required by the treaties. 702 F.2d at 822, 824. However, the court also states that the aggregate approach offered by the Association is precluded by the treaties as "the exclusive rule" of salmon allocation, suggesting perhaps some flexibility in this regard. It also notes that the Secretary and Washington State have been expressly invited by the District Court to seek relief whenever a departure from the usual rule is warranted. 702 F.2d 823. Any such flexibility is, however, of no avail to the Association since the District Court, where continuing jurisdiction over this issue is maintained, has already denied its intervention, which denial was upheld by the Ninth Circuit and a petition for certiorari to this Court denied. Hoh v. Baldrige, No. C81-742 (W.D. Wash. July 23, 1981), Washington State Charterboat Assoc. v. Hoh, No. 81-3459 (9th Cir. Mar. 15, 1982), cert. denied, 103 S.Ct. 141 (1982). The Association cannot, therefore, reduce the impact of the run-by-run approach by application to the court as suggested in the Ninth Circuit decision. 702 F.2d 823, footnote 6. Even if the Association could apply to the court for a modification of the run-by-run rule in a given year, it is simply nonsensical to require such modifications be sought each year when the situation on the Washington coast is such that run-by-run allocation is impermissible as a violation of both the FCMA and non-Indian treaty rights as a matter of definition in all years.

totally on its interpretation of the following isolated language in Fishing Vessel:

> In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. (emphasis supplied).

443 U.S. at 679. However, a review of the remainder of Fishing Vessel, and the U.S. v. Washington decision which it largely upheld, clearly demonstrates that this reference to "each run" was not intended to require an actual 50% sharing of the harvest of each run in all circumstances, so long as a harvest equivalent to such fair share of each run is provided by whatever allocation format is adopted. Rather, the fundamental principle which cannot be violated is that both the Indian and non-Indian fishermen receive a fair share of the harvest of fish that would otherwise return to the tribes' usual and

accustomed fishing grounds. As discussed above, this fundamental principle simply cannot be complied with using run-by-run management of the ocean fishery since the non-Indian would not be able to harvest his fair share.

The Ninth Circuit Court of Appeals decision below fails to recognize that the "fair share" principle developed by this Court must be the primary factor in determining what management measures are required to implement treaty obligations to both the Indian and non-Indian fishermen. This principle found its genesis in U.S. v. Washington. Judge Boldt in U.S. v. Washington held that the treaty language reserving to the treaty Indians a right to take fish "in common" with "all citizens of the territory" means sharing equally the opportunity to take fish at "usual and accustomed grounds and stations." 384 F.

Supp. at 343. In establishing this equal sharing as the basic principle of Indian treaty rights, the court recognized the difficulty inherent in developing an allocation or management scheme to implement this basic right in the case area:

> While emphasizing the basic principle of sharing equally in the opportunity to take fish at usual and accustomed grounds and stations, the court recognizes that innumerable difficulties will arise in the application of this principle to the fisheries resource. For the present time, at least, precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience.

384 F. Supp. at 343 (emphasis supplied).

This Court has since modified the equal sharing principle of U.S. v. Washington. In Fishing Vessel, this Court examined the "equal share" principle announced in U.S. v. Washington and modified

it to be a "fair share" principle:[12]

> The purport of our cases is clear. Non-treaty fishermen may not rely on property law concepts, devices such as the fish wheel, license fees, or general regulations to deprive the Indians of a fair share of the relevant runs of anadromous fish in the case area. Nor may treaty fishermen rely on their exclusive right to access to the reservations to destroy the rights of other "citizens of the territory." Both sides have a right, secured by treaty, to take a fair share of the available fish. That, we think, is what the parties to the treaty intended when they secured to the Indians the right of taking fish in common with other citizens.

443 U.S. at 684-5 (emphasis supplied.)

It is abundantly clear that application of the run-by-run allocation principle would violate the fundamental "fair share" principle since, as detailed above at pages 11-18, it would, by definition, deprive

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[12]Unlike the District Court, this Court refused to designate a definite percentage of harvest necessary to constitute the "fair share" of the Indian treaty right, but instead put a ceiling of 50% on such allocation with the level to be determined by that necessary to provide a "moderate living." 443 U.S. at 685.

the non-Indian of anything near his "fair share" of any but the weakest of the runs returning to the north coastal streams. The Ninth Circuit decision simply does not address this very basic flaw in the application of run-by-run allocation to the circumstances of the ocean fishery.[13]

A review of U.S. v. Washington and Fishing Vessel makes it clear that the way to harmonize the Court's language regarding rights to "each run" of fish with the basic "fair share principle" as applied to the ocean fishery is to recognize that the share of each run is a measure of the quantity of the right rather than a directive as

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[13]The Ninth Circuit decision also does not explain why, since run-by-run management cannot result in an equal sharing of a given run, management must always be accomplished to provide the treaty Indians with the excess share. This result, avoided by use of an aggregate allocation system, is certainly in conflict with this Court's conclusion that both Indian and non-Indian fishermen have equal treaty rights to a fair share of the resource.

to how the fish harvest must actually be managed. For example, if five different runs of 2,000 fish each would otherwise return to a tribe's usual fishing grounds, the tribe would have a total right measured by the sum of one-half the number of fish in each run (5,000 fish), but if equal sharing of each run was not practical or feasible, this right could be satisied by providing the tribe with a harvest of 5,000 fish even if they did not get precisely 1,000 fish from each run.

While Judge Boldt in U.S. v. Washington adopted an "equal sharing principle" similar to this Court's fair share principle, he implemented that principle in the case area[14] through a combination of

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[14]The court in U.S. v. Washington only adopted division and allocation schemes to implement this principle for the case area (comprising the territorial waters of the State of Washington) and specifically excluded the ocean fisheries now subject to the Secretary's jurisdiction under the FCMA.

regional, aggregate allocation and run-by-run allocation depending on the circumstances involved.[15] In a pre-FCMA, 1976 order, Judge Boldt made it clear that aggregation of runs was permissible on a regional basis:

> 2. Are shares to be calculated separately for chum salmon stocks that differ in the timing of their runs?
>
> Response:
>
> No--not for stocks within the same region or river system or a combination described above--but they shall be managed separately.
>
> . . .
>
> 4. Are shares to be calculated on a stream-by-stream basis, a regional basis, or for the case area?

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[15]The probable reason that Judge Boldt in U.S. v. Washington attempted to provide harvest of each run when practical was to avoid the necessity of comparing the value of fish "traded" between runs to meet the treaty obligation. When each run can practically be shared evenly, one need not worry about fish from one run being heavier or worth more than fish from other runs. However, adjustments to reflect equal value can be made when it is not possible to evenly divide each run such as is the case with the ocean fishery.

Response:

> The shares which treaty and non-treaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river system by river system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs. Further clarification is presented in the responses below. In some cases, for more effective management or because data for stock separation do not exist, the sharing must be on a regional basis.

459 F. Supp. 1020, 1070 (1978) (emphasis supplied). Judge Boldt fully recognized that a run-by-run allocation could not feasibly result in equal sharing even in the case area where separated stock net fisheries predominate for both Indian and non-Indian. He therefore adopted a regional aggregate approach for part of the Puget Sound region, similar to that sought for the north coastal streams by the Association.

Noting the need to devise apportionments that assured the Indians'

reasonable livelihood needs would be met, this Court clearly approved Judge Boldt's allocation (which included the regional aggregate approach in much of the Puget Sound area):[16]

> The division arrived at by the district court is also consistent with our earlier decisions concerning Indian treaty rights to scarce natural resources. In those cases, after determining that at the time of the treaties the resource involved was necessary to the Indians' welfare, the court typically ordered a trial court or special master, in his discretion to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met [citations omitted].
>
> This is precisely what the District Court did here, except that it realized that some ceiling should be placed on the Indians' apportionment to prevent their needs from exhausting the entire resource and thereby frustrating the treaty right

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[16]It is interesting to note that the regional aggregate allocation devised by Judge Boldt was here noted by the Court to be consistent with the same cases the Court cited to support the language regarding "each run," which language the Ninth Circuit felt required a run-by-run approach--the antithesis of the regional aggregate.

of "all other citizens of the territory."

443 U.S. at 685-6 (emphasis supplied.)

Thus this Court has clearly recognized that a run-by-run allocation approach is not required to comply with the "fair share" principle and that regional aggregation can be used when necessary. Such aggregation is clearly necessary in the case of the mixed stock ocean fishery and the north coastal stocks, since, without it, the non-Indian fisherman simply cannot harvest their fair share of the resources.

B. Run-by-Run Allocation Is Directly Contrary to the Basic Requirements of the FCMA.

The decisions by the courts below totally ignore the key fact, which was admitted by the Secretary, that the great reduction in ocean harvest caused by run-by-run allocation results in a very substantial transfer of harvest into foreign fisheries. This transfer of harvest to foreign fisheries

constitutes a clear violation of National Standard 1 of the FCMA which requires that Secretary's regulations to achieve the "optimum yield" to the nation's fisheries.[17]

The congressional purposes in promulgating the FCMA are contained in 16 U.S.C. § 1801(b). Included in these purposes are:

> (3) To promote domestic, commercial and recreational fishing under sound conservation and management principles;
>
> (4) To provide for the preparation and implementation, in accordance with national standards, of a fishery management plan which will achieve and maintain, on a continuing basis, the optimum yield from each fishery.

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[17]The Ninth Circuit improperly focuses only on transfer of harvest to other Washington state fisheries when concluding that the optimum yield argument ignores the physical realities of the salmon life cycle such as the fact that harvestable fish in ocean waters are the same fish that return to the streams of Washington state to spawn. 702 F.2d at 823. The transfer of harvest into foreign fisheries is the thrust of the Association's argument regarding optimum yield. Id.

Id. The Secretary is required to insure that the plan comports with seven national standards,[18] including:

> (1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.
>
> . . .
>
> (4) Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign privileges among various United States fishermen, such allocation shall be: (a) fair and equitable to all such fishermen; (b) reasonably calculated to promote conservation; and (c) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a).

The term "optimum yield" was defined by Congress as follows:

> The term "optimum," with respect to the yield from a fishery,

---

[18]Not goals as suggested by the Ninth Circuit in its decision below. 702 F.2d at 823.

means the amount of fish--

> (A) Which will provide the greatest overall benefit to the nation, with particular reference to food production and recreational opportunities; and
>
> (B) Which is prescribed as such on the basis of the maximum sustainable yield from such fishery as modified by any relevant economic, social, or ecological factor.

16 U.S.C. § 1802(18). Legislative history further explains the concept of optimum sustainable yield:

> The concept of optimum sustainable yield is, however, broader than the consideration of the fish stock and takes into account the economic well-being of the commercial fishermen, the interests of the recreational fishermen, and the welfare of the nation and its consumers. . . .

H.R. Rep. No. 445, 94th Cong., 1st Sess. 48-49.

As the preeminent national standard, optimum yield therefore requires the consideration of many factors. All of these factors are totally inconsistent with

management of the ocean fishery to provide run-by-run allocation on the Washington coast.

Domestic food production on a continuing basis is a primary consideration upon which to measure the compliance of the Secretary's regulations with optimum yield requirements of the FCMA. As set forth earlier in this petition, run-by-run allocation causes extremely large transfers of harvest to foreign fisheries. This transfer is certainly inconsistent with the optimum food production requirements of the FCMA which, as set forth above, look only to the food production to the nation.[19]

The FCMA also requires that recreational benefits must be optimized on a continuing basis in order to comply with the optimum yield standard. By drastically

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[19]One of the primary purposes of the FCMA, as noted by the Ninth Circuit decision below, was to limit the harvests by foreign fishermen. 702 F.2d at 824.

reducing the ocean quota, run-by-run allocation would serve to minimize, if not eliminate, the vast majority of recreational harvest on ocean stocks. As such, the inconsistency with the preeminent optimum yield national standard could not be more clear.

The FCMA also prescribes that optimum yield determinations must include consideration of relevant economic and social factors of the commercial and recreational fisheries. As set forth above, run-by-run management has a devastating impact on the ocean recreational fishery and the charter-boat industry. It is clear this industry cannot continue to survive the economic hardship which will result from run-by-run allocation. Similar impacts will occur to the non-Indian ocean troll fishery and the economy it supports. The potentially devastating social and economic impacts of a management scheme which would displace the

charterboat industry and the troll fishery in the state of Washington must be considered to be in violation of the optimum yield requirements of the FCMA.

National Standard 4 of the FCMA requires that the fishery management plans adopted by the Secretary not discriminate among fishermen, be fair and equitable to all such fishermen, and be carried out so that no entity acquires an excessive share of the resource. The Association believes that a management plan which provides the coastal treaty Indians with far more than their 50% share of the harvest of coastal treaty fish is not only in violation of treaty rights, as set forth above, but is discriminatory, inequitable, and provides the coastal tribes an excessive share of the fish, all in violation of this national standard under the FCMA. In addition, the fact that run-by-run management causes large transfers to commercial fisher-

men in Puget Sound also constitutes a violation of National Standard 4.

It is therefore clear that the requirement for run-by-run allocation of harvest in the north Washington coastal fisheries would result in violations of the Secretary's duty under the national standards set forth in the FCMA. Regional aggregate allocation would be consistent with these national standards while at the same time providing the tribes their rights to 50% of the fish which would otherwise return to their usual and accustomed places of fishing. Optimum yield could be obtained along with a fair and equitable distribution of harvest. While the tribes would still get all of the fish they are entitled to under the treaties, the non-Indian harvest could be maintained in a fashion which would avoid the severe socio-economic impacts associated with run-by-run management.

C. The Indian Treaty Rights and the FCMA Must Be Construed Consistently, If Possible, But If the Indian Treaty Rights Are Held To Require Run-by-Run Allocation, Then Such Treaty Rights Have Been Modified by the FCMA.

It is the contention of the Association that the Secretary must comply with the requirements of both the treaty rights and the FCMA wherever possible, and that if such requirements are totally inconsistent, then the treaty must be deemed modified to the extent of the inconsistency. In this case, however, no such inconsistency exists. An aggregate approach to meeting the fair share principle of the Fishing Vessel case avoids most of the very substantial transfer of harvest to foreign fisheries caused by the application of run-by-run allocation. Since an aggregate approach to allocation is permissible under treaty fishing rights, as discussed above, using an aggregate approach one can both meet the require-

ments of the treaties as well as the optimum yield requirements of the FCMA.

However, if the treaty does indeed require run-by-run allocation, then it must be deemed modified by the FCMA insofar as necessary to remove the inconsistency with the national standards. It is well accepted that federal treaties and statutes have the same status under the U.S. Constitution and that Congress has the power to modify or abrogate Indian treaties by subsequent enactment. See, e.g., Reid v. Covert, 354 U.S. 1, 18 (1957); U.S. v. Fryberg, 622 F.2d 1010 (9th Cir. 1980). As stated in Reid v. Covert, supra:

> This court has also repeatedly taken the position that an act of Congress, which must comply with the Constitution, is on a fully parity with a treaty, and that when a statute which is subsequent in time is inconsistent with the treaty, the statute to the extent of conflict renders the treaty null.

354 U.S. at 18.

In Fryberg, the Ninth Circuit concluded that the Eagle Protection Act modified Indian treaty rights to take eagles. Given the overriding purpose of the Eagle Protection Act to insure the protection of the Bald and Golden Eagles, the court concluded that the Eagle Protection Act modified and abrogated the treaty right to take, shoot, and kill eagles. The court reached this conclusion even though neither the statutory language nor the legislative history expressly stated that Indian treaty rights were to be modified or abrogated.

The overriding purpose of the FCMA is to provide an overall fishery conservation and management program which will be in the best interests of the nation by sustaining the optimum yield from the fishery while providing for the maintenance of a viable recreational and commercial fishery. 16 U.S.C. § 1801. Just as in the Fryberg

case, supra, this overriding congressional purpose would be totally thwarted by an interpretation of the treaty requiring run-by-run allocation. Therefore, if the treaty requires that run-by-run allocation be applied to the ocean fishery, the treaty must be deemed modified by the clearly inconsistent requirements of the FCMA.[20]

CONCLUSION

The decisions of the courts below fly in the face of this Court's previous holdings regarding the non-Indians' treaty right to a fair share of the fishery harvest as well as the FCMA's requirements for optimum yield to the domestic fishery and fair and equitable distribution among U.S. fishermen. If review of these decisions is not

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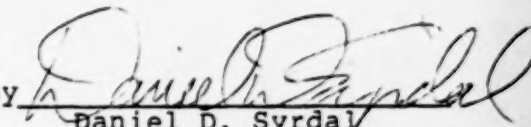
[20]As was also the case in Fryberg, this case does not present a substantial modification of Indian treaty rights even if run-by-run allocation was otherwise required by the treaty. Under a regional, species aggregate approach, the treaty tribes would still receive 50% of the total harvest.

granted by this Court, and these decisions overturned, the non-Indian fishing industry off the coast of Washington will cease to exist as we know it. The fate of these industries, and the social and economic well-being of all those citizens of the state of Washington which rely thereon, is therefore dependent upon review by this Court.

Respectfully submitted,

SYRDAL, DANELO,
KLEIN & MYRE, P.S.

By 
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IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff, v. MALCOLM BALDRIDGE, Secretary of Commerce, Defendant.	)	No. C81-836 V ORDER

[Entered February 12, 1982]

This case is before the Court on cross-motions for summary judgment. The Hoh and Quileute Indian Tribes and the Quinalt [sic] Indian Nation have filed a memorandum as amicus curiae opposing plaintiff's motion for partial summary judgment.

Having reviewed the motions and memoranda in support thereof and being fully informed, the Court hereby orders that plaintiff's motion for partial summary

judgment is denied and that pursuant to Rule 56(b), Federal Rules of Civil Procedure, defendant's motion for summary judgment is granted as to plaintiff's third cause of action. The reason for granting defendant's motion as to the third cause of action is set forth in the following.

Plaintiff acknowledges at page 8, lines 7-17 of its reply brief that the declaration it seeks in this action, that is, that defendant must adopt regulations for the Washington ocean fishery based on a regional, aggregate species approach, would necessarily be inconsistent with the Court's order in Hoh v. Baldridge, ____ F. Supp. ____, (W.D. Wa. 1981), No. C81-742R(C). In Hoh, the Court held that the treaty right of the plaintiff tribes was a right to take approximately 50% of each run of salmon, managed on a river system by river system, run by run basis. See page 2, paragraph 4 of the

Declaratory Judgment and Decree. While recognizing that this rule is not inflexible, the Court finds that this case is indistinguishable from Hoh and is not otherwise persuaded that it should not adhere to the holding of Hoh.

Finding no material issue of fact presented, and based on Hoh, supra, United States v. State of Washington, 459 F. Supp. 1020, 1070 (W.D. Wa. 1978), and Washington v. Washington State Passenger Fishing Vessel Association, 443 U.S. 658, 679 (1979), defendant's motion is granted as to the third cause of action and plaintiff's is denied.

There being no just cause for delay, the Court hereby directs the entry of final judgment pursuant to Rule 54(b) as to the third cause of action of plaintiff's complaint.

IT IS SO ORDERED.

DATED at Phoenix, Arizona this /s/ 12th day of February, 1982.

/s/_____
Walter E. Craig
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff, v. MALCOLM BALDRIDGE, Secretary of Commerce, Defendant.	No. C81-836 JUDGMENT

[Filed February 19, 1982]

This matter having come on for consideration before the Court, Honorable Walter E. Craig, United States District Judge, presiding, and the issues having beenn duly considered and a decision having been duly rendered, defendant's motion for summary judgment is granted as to plaintiff's third cause of action.

IT IS HEREBY ORDERED AND ADJUDGED, summary judgment is entered as to plaintiff's third cause of action.

DATED this 19th day of February, 1982.

/s/_____
Diane Boyd
Deputy United States District Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant,	)	No. 82-3115
v.	)	D.C. No. C81-836
MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	OPINION

[Filed March 29, 1983]

Appeal from the United States District Court
Western District of Washington
Hon. Walter E. Craig, Judge Presiding
Argued and Submitted: January 6, 1983

Before: BROWNING, Chief Judge, and FLETCHER and PREGERSON, Circuit Judges.

PREGERSON, Circuit Judge:

Appellant Washington State Charterboat Association is an organization of Washington State citizens who operate offices and vessels serving ocean sport anglers. The Association brought this litigation to compel the Secretary of Commerce (Secretary) to

revise the federal management plan for salmon fishing off the coast of Washington. Specifically, the Association seeks to substitute an "aggregate" approach for the "run-by-run" approach used by the Secretary to determine the portions of each North Pacific salmon harvest allocated to various Indian tribes under the federal plan. According to the Association, the run-by-run approach is not required by the treaties that established the Indians' fishing rights and is inconsistent with the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1802 (Magnuson Act). These legal issues were argued to the district court on cross-motions for summary judgment. The district court granted summary judgment in favor of the Secretary. The Association appeals. We affirm.1/

I.

This action arises from a history of controversy between treaty and nontreaty fishers in Washington State over the division of fishing rights. See, e.g., S. Rep. No. 667, 96th Cong., 2d Sess. 2 (1980). Treaties negotiated by Governor Isaac Stevens between the United States and several Pacific Northwest Indian tribes in the 1850s establishing the rights of the treaty fishers.2/ In 1970 the United States, on its own behalf and as trustee of seven Indian tribes, initiated litigation to clarify the treaty fishers' rights. See United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974) ("final" decision) (Boldt, J.), aff'd 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976); United States v. Washington, 459 F. Supp. 1020, 1020-1130 (W.D. Wash. 1974-1978) (post-trial decisions), various appeals dismissed, 573

F.2d 1117 (9th Cir. 1978), 573 F.2d 1118 (9th Cir. 1978), 573 F.2d 1121 (9th Cir. 1978), various appeals aff'd sub nom. Puget Sound Gillnetters Association v. United States District Court, 573 F.2d 1123 (9th Cir. 1978) (aff'g decisions at 459 F. Supp. at 1097-1118 (W.D. Wash. 1977-78)), aff'd in part, vacated in part, and remanded sub nom. Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979) (hereinafter Fishing Vessel). The litigation culminated in the holding that treaty fishers have a right to a share of each run of anadromous fish[3] that passes through the "usual and accustomed" Indian fishing sites. Fishing Vessel, 443 U.S. at 685.

This action represents at least the second effort of the Association[4] to challenge the Secretary's approach in allocating a portion of each annual harvest to

treaty fishers.5/ The Association complains that the run-by-run approach forces the Secretary to call an early halt to each year's ocean harvest by nontreaty fishers to protect individual runs of the depressed species, viz., chinook and coho. (The chinook and coho are line-biting fish and are thus the salmon species of primary interest to the Association.) The Association cites, for example, the Secretary's plan for the 1981 ocean harvest off the coast of Washington. The plan provided for a commercial season from May 1 to May 31 for all salmon species except coho and for all species from July 15 to September 1, subject to closure whenever the coho harvest reached 372,000 fish. 46 Fed. Reg. 30,633, 30,641-42 (1981). The plan also provided for a recreational season from May 23 to September 7, with a daily bag limit of two salmon (three north of the Queets River, only two of which could be chi-

nook or coho). This season was subject to closure whenever the harvest of coho reached 248,000 fish. Id.

The Association contends in this appeal that the Secretary should use an aggregate approach that would give the region's treaty fishers roughly half of the total salmon harvest, i.e., half of the harvest of all species, including chum and sockeye. Under the Association's aggregate approach, treaty fishers would be compensated for loss of their usual stream-harvested share of the chinook and coho through an allocation of more than half of the chum and sockeye. According to the Association, an aggregate approach is permitted by the Stevens treaties and is required by the Magnuson Act. The Association argues alternatively that, if the Stevens treaties do not permit an aggregate approach, they have been, to that extent, abrogated by the Magnuson

Act.

II.

The Association's proposed aggregate approach is precluded by the treaties negotiated by Governor Stevens with the Indians. All of these treaties provide that "[t]he right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, n common with all citizens of the Territory . . . ." Treaty of Medicine Creek, art. III, 10 Stat. 1133 (quoted in Fishing Vessel, 443 U.S. at 674). Fishing Vessel provides the controlling construction of this critical treaty provision. The Court there declared, "In our view, the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas." Id. 443 U.S. at 679 (emphasis added). The Court further held that the

Indians' treaty share of each run is presumptively half but that this presumptive share should be reduced whenever tribal needs would be satisfied by a lesser amount. Id. at 685-86. Thus, the Indians' treaty share is a "fair share" of each run. Id. at 684.

The Association argues that by substituting a "fair share" for a fifty-fifty, treaty-nontreaty division of fish originally proposed by the district court in United States v. Washington, 384 F. Supp. 312, the Supreme Court somehow abandoned the run-by-run approach. Nothing in the Court's opinion supports this interpretation of Fishing Vessel. In discussing the very issue of the Indian's "fair share," the Court stated:

> We also agree with the Government that an equitable measure of the common right should initially divide the harvestable portion of each run that passes through a "usual and accustomed" place into approximately equal treaty and nontreaty shares, and should then

> reduce the treaty share if tribal needs may be satisfied by a lesser amount.

Fishing Vessel, 443 U.S. at 685 (emphasis added).

The Association next contends that, because the line of cases leading up to Fishing Vessel addressed issues concerning fishing in the interior waters of Washington State and did not involve ocean waters under the jurisdiction of the United States, the Secretary must divide the harvest of fish as the Association proposed in order to achieve the Magnuson Act goal of the "optimum yield." 16 U.S.C. § 1851(a)(1) (1976). This argument ignores not only the physical realities of the salmon life cycle, viz., the fact that harvestabl fish in ocean waters are the same fish that return to the streams of Washington State to spawn, but also the fact that the Court expressly included ocean catches in the allocation of fish. Fishing Vessel, 443 U.S.

at 688.

The Association also asserts that the district court's orders in United States v. Washington, 384 F. Supp. 312, do not require run-by-run allocations of fish. The Association relies on various statements of the district court regarding the need for flexibility in allocating harvest shares to respond to special local circumstances. Contrary to the position of the Association, however, the district court clearly adhered to the right of each tribe to take a share of each run passing through tribal fishing sites as the regional rule of allocation. Hoh Indian Tribe v. Baldridge, 552 F. Supp. 683, 689 (W.D. Wash. 1981). The Secretary and Washington State have been expressly invited by the district court to seek relief in that court whenever a departure from the usual rule is warranted by, among other concerns, the needs of nontreaty fishers.6/ Id.

The Association next argues that the run-by-run approach was treated in Fishing Vessel simply as a means of calculating the treaty fishers' overall harvest share, not as a rule for determining a "fair share" of salmon that individual tribes could take from their "usual and accustomed" fishing sites. The Association's interpretation of the right to take fish "in common" is indistinguishable from the hypertechnical readings of treaty language that have been rejected by the Supreme Court. See Fishing Vessel, 443 U.S. at 675-78.

In short, the Stevens treaties preclude adoption of an aggregate approach as the exclusive rule of salmon allocation.

III.

Finally, the Association maintains that the run-by-run approach diminishes the overall annual harvest and is, as a consequence, inconsistent with the Magnuson's

Act "optimum yield" goal, 16 U.S.C. § 1851(a)(1) (1976). Therefore, the Association contends that, to the extent the Stevens treaties require a run-by-run approach, they were abrogated by the Magnuson Act.

Congress' intent to abrogate or modify an Indian treaty must be clear. Menominee Tribe v. United States, 391 U.S. 404, 412-13 (1968). Such an intent may be found in the express provisions of an act or in its surrounding circumstances and legislative history. United States v. Fryberg, 622 F.2d 1010, 1016 (9th Cir. 1980). There is, however, nothing in the language of the Magnuson Act or in its legislative history that even remotely suggests that Congress intended to abrogate or modify the Stevens treaties. On the contrary, the Magnuson Act expressly provides that each fishery management plan approved by the Secretary shall be

consistent with all provisions of the Act and "any other applicable law." 16 U.S.C. § 1853(a)(1)(C) (1976). Such "other law" includes the Stevens treaties.

The purpose of the Magnuson Act was to protect United States fisheries by extending the exclusive fisheries zone of the United States from 12 to 200 miles and to provide for management of fishing within the 200-mile zone. H.R. Rep. No. 445, 94th Cong., 1st Sess. 21 (1975), reprinted in 1976 U.S. Code Cong. & Ad. News 593, 593-94. The extension of the zone indicates that Congress was concerned about harvests by foreign fishers, not catches by treaty fishers. Five years later, relying on the assumption that treaty fishers have a right to take a "fair share" of each annual harvest, Congress decided to assist nontreaty fishers by enacting the Salmon and Steelhead Conservation and Enhancement Act of 1980,

Pub. L. No. 96-561, 94 Stat. 3275 (in part amending the Magnuson Act; codified in scattered sections of titles 15, 16 and 46). See H.R. Rep. No. 1243, 96th Cong., 2d Sess. 12, 18 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 6793, 6794, 6810.

The district court was correct in granting summary judgment in favor of the Secretary. The run-by-run approach for allocating salmon is required by the Stevens treaties and has not been abrogated by the Magnuson Act. Thus, we AFFIRM.

FOOTNOTES

1. Summary judgment is appropriate where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Lutcher v. Musicians Union Local 47, 633 F.2d 880, 882 (9th Cir. 1980). Here, the parties agreed to the facts.

2. The United States entered into the treaties with the Indians to extinguish the last conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia River in what is now Washington State. The treaty with amici (who are treaty fishers of the Quinault Indian Nation, the Hoh Indian Tribe, and the Quileute Indian Tribe) is the Treaty of Olympia, July 1, 1855, and January 25, 1856, ratified March 8, 1859, and proclaimed April 11, 1859, 12 Stat. 971. See United States v. Washington, 384 F. Supp. 312, 349 (W.D. Wash. 1974).

3. "Anadromous fish" are fish which are spawned or artificially produced in freshwater, reach maturity in the ocean, and then return to their water of origin to spawn. See 384 F. Supp. at 405. A "run" is a group of anadromous fish on their return migration, identified by species, race, and water of origin. See id.

4. The Association tried to intervene in Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981) (Craig, J.), in which amici in this appeal challenged the Secretary's 1981 harvest plan, seeking reductions in either the ocean harvest limits or Washington State's spawning escapement goals. When the Association appealed the district

court's denial of its motion to intervene, this court held that the Association's challenge was foreclosed by the line of cases leading up to Fishing Vessel and by Fishing Vessel itself. Hoh Indian Tribe v. Baldrige, No. 81-3459 (9th Cir. Mar. 15, 1982) (memorandum) cert. denied, ____ S. Ct. ____ (1982). The panel described the Association's effort as a "thinly-veiled" attempt to "relitigate issues that have previously been decided." Id.

5. The relevant duties of the Secretary are set forth in the Magnuson Fishery Conservation and Management Act, 16 U.S.C. § 1801-1882, which charges the Secretary with responsibility for establishing annual harvest plans for each ocean fishery consistent with the goals established by the Act. The goals include achievement of the "optimum yield" from each fishery, 16 U.S.C. § 1851(a)(1) (1976), and a fair allocation of fishing privileges among all United States fishers, id. § 1851(a)(4)(A). In addition, the Secretary must determine that each plan is consistent with "any other applicable law." Id. § 1854(b).

6. Appellants may be able to reduce the impact of the run-by-run approach to some extent by agreement with the Secretary and the affected tribes or by application to the court for modification of the Secretary's plan. See Hoh Indian Tribe v. Baldrige, 522 F. Supp. at 690.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	No. 82-3115 DC CV 81-836 Craig JUDGMENT

[Filed and Entered June 22, 1983]

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in

this Cause be, and hereby is affirmed.

Filed and entered March 29, 1983.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WASHINGTON STATE CHARTERBOAT ASSOCIATION, Plaintiff-Appellant, v. MALCOLM BALDRIGE, Secretary of Commerce, Defendant-Appellee.	)	No. 82-3115 ORDER

[Filed June 9, 1983]

Before: CHIEF JUDGE BROWNING and FLETCHER and PREGERSON, CIRCUIT JUDGES

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote of the suggestion for rehearing en banc. Fed.

R. App. R. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 83-459

In the Supreme Court of the United States

OCTOBER TERM, 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,
PETITIONER

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether regulations governing ocean salmon fishing off the coast of Washington for 1981, which provided for escapement of sufficient numbers of salmon so that coastal Indian tribes could harvest approximately one half of each run, are within the discretion of the Secretary of Commerce under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1851(a)(1) and (4).

2. Whether the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, has impliedly abrogated the Stevens Treaties.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-459

WASHINGTON STATE CHARTERBOAT ASSOCIATION, PETITIONER

v.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 7-22) is reported at 702 F.2d 820. The order of the district court (Pet. App. 1-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1983 (Pet. App. 23-24). A petition for rehearing was denied on June 9, 1983 (Pet. App. 25-26). The petition for a writ of certiorari was filed as of September 6, 1983, on September 19, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case is an offshoot of the longstanding controversy over the allocation of Pacific Northwest salmon between treaty and nontreaty fishermen. Petitioner, an association of several hundred individuals who own and operate charter offices and vessels engaged in the recreational fishing industry, challenges the Secretary of Commerce's restrictions on ocean harvesting of salmon off the coast of the State of Washington. The fishing rights of Indian and non-Indian fishermen under the so-called "Stevens Treaties" [1] have been adjudicated in the continuing case of *United States* v. *Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), further proceedings, 459 F. Supp. 1020, aff'd, 573 F.2d 1123 (9th Cir. 1978), substantially aff'd *sub nom. Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n* (*Fishing Vessel*), 443 U.S. 658 (1979). The ocean harvesting restrictions at issue were also the subject of *Hoh Indian Tribe* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981). The factual and legal background of these restrictions is described in the district court's opinion in *Hoh*.

2. The restrictions at issue apply to salmon and steelhead trout. These are "anadromous" fish, which are hatched in the rivers of the Pacific Northwest, migrate to the ocean for a period of maturity, and

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[1] Treaty of Olympia, July 1, 1855, 12 Stat. 971; Treaty with the Yakimas, June 9, 1855, 12 Stat. 951; Treaty of Medicine Creek, Dec. 26, 1854, 10 Stat. 1132; Treaty of Point No Point, Jan. 26, 1855, 12 Stat. 933; Treaty of Neah Bay, Jan. 31, 1855, 12 Stat. 939; Treaty of Point Elliott, Jan. 22, 1855, 12 Stat. 927.

return to their native streams to spawn. During this migration, these fish are prey to fisheries in the ocean waters and, upon return to their native streams, to inland fisheries many of which are operated by Indians pursuant to their treaty rights. While in the open sea, fishing is essentially of mixed stock; ocean fisheries are not generally able to pursue any particular species or fish of any particular origin. Once inland, however, the fish are identifiable as "runs," *i.e.*, groups of fish designated by species, race, and water of origin. See *United States* v. *Washington*, 384 F. Supp. at 405. Ocean and inland fisheries necessarily compete for limited stocks of harvestable fish. A larger allocation of fish to ocean fisheries leaves fewer fish available for inland fisheries and for the escapement needed to maintain and replenish the resource.

The Secretary is responsible for establishing and implementing annual fishery management plans or amendments to such plans under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, throughout the 3-200 mile zone off the coast of the State of Washington.[2] This Court has

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[2] The Secretary acts upon fishery management plans normally proposed in the first instance by regional councils comprising representatives of affected States and of various groups interested in the resource. 16 U.S.C. 1852-1855. The Secretary must determine that a plan and the regulations to implement it are consistent with certain national standards set forth in the statute. 16 U.S.C. 1854(a). These include achievement of the so-called "optimum yield" from each fishery, which entails a blending of biological and ecological factors with economic and social factors. 16 U.S.C. 1851 (a)(1). These national standards also embrace a concept of fair and equitable allocation of fishing privileges among various United States fishermen, 16 U.S.C. 1851(a)(4), and call

held that that Act (16 U.S.C. 1811, 1812) "clearly place[s] a responsibility on the United States, rather than the State, to police the take of fish in the relevant waters by Washington citizens insofar as is necessary to assure compliance with the [Stevens] treaties." *Fishing Vessel*, 443 U.S. at 688. Accordingly, the Secretary sets the annual limit on ocean harvests of treaty fish at a level that will guarantee treaty fishermen their fair share of the catch, as well as ensuring sufficient escapement to maintain and replenish the resource.

At issue in *Hoh* and in the instant case is the Secretary's methodology for determining the treaty fishermen's share of the expected harvest and the appropriateness of his corresponding ocean fishing management scheme. If, as petitioner suggests, an overall aggregation of all runs of all species in all the river systems of the region is used as the base from which a 50% share is calculated, then tribes residing or fishing on rivers with lower numbers of returning fish could receive substantially less than the 50% maximum allocation established in *Fishing Vessel*, 443 U.S. at 685-686. If, on the other hand, each tribe is guaranteed 50% of the weakest run of fish, then tribes residing or fishing on rivers with greater numbers of returning fish could receive more than 50% of those other runs, to the comparative detriment of ocean fishermen, including petitioner's members. The problem arises because some salmon stocks in the mixed-stock ocean fishery are in a depressed condition and cannot withstand fishing pressure to the same de-

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for the use of the best scientific information available. 16 U.S.C. 1851(a)(2). In addition to these standards, the Secretary's actions must be faithful to "any other applicable law." 16 U.S.C. 1854(a)(1)(A).

gree as healthier stocks. If ocean fisheries were permitted to catch a full 50% of the harvestable portion of the mixed stock of fish at sea, then the weaker runs of fish would be so depleted that few or none would be available to Indian fisheries on the rivers. Conversely, if non-Indian ocean fisheries are required to end their season when they have harvested that quantity of the *weakest* run of fish which would leave to the treaty fishermen an equal share of the harvestable portion of that run, they would not be able to harvest the full quantity of the stronger runs that would otherwise be available to them.[3]

3. In 1980 and 1981 the Secretary's management plan for Washington north coast coho was predicated upon a system of single species aggregation intended to allow the Washington coastal tribes collectively to take 50% of the harvestable number of coho returning to the combined coastal river systems. This resulted in a return to some of the river systems of fewer fish than were necessary to achieve both the State-established spawning escapement goal for that river and a tribal harvest of their treaty share of the run. *Hoh*, 522 F. Supp. at 687.

In 1981, both petitioner and the Hoh, Quileute, and Quinault Tribes brought suit to challenge the Secretary's management plan. The tribes' suit, *Hoh Indian Tribe* v. *Baldrige*, *supra*, was brought on June 22,

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[3] These excess quantities of the stronger runs of fish, not harvested by ocean fisheries, would be available to treaty fisheries, non-treaty fisheries, or Canadian fisheries in the case of fish native to Canadian rivers. Absent agreement of the affected tribe or endorsement by the court, the additional quantity of fish caught by some treaty fisheries under this river-by-river, run-by-run system of allocation would not generally be used to offset their entitlement to a fair share of the weaker runs. 522 F. Supp. at 690.

1981. The tribes sought reductions either in the ocean harvest or in the State's spawning escapement goals. The tribes' legal theory was that the treaties envisioned approximately equal sharing on a river-by-river, run-by-run basis. The Secretary agreed that this was the general, although not inflexible standard, wherever practical, and pointed out that the expected ocean harvest level in the 1981 plan would result in such roughly equal sharing if the State's spawning escapement requirements were moderated. The district court ruled that the State's escapement goals could not be justified on grounds of conservation of the resource, and therefore invalidated them. *Hoh*, 522 F. Supp. at 690-691. The court declined to disturb the Secretary's plan for ocean fishing. It approved the proposition that the river-by-river, run-by-run allocation principle is not inflexible, but that departures from it should be the subject of agreement of the parties or future application to the court (*id.* at 690). The district court also ordered the parties to negotiate a long-term framework for the control of these fisheries, which effort is still in progress (*id.* at 692). No appeal was taken in *Hoh*.

The State of Washington and petitioner herein each sought leave to intervene in the *Hoh* litigation, and each motion was initially denied. The State later renewed its application, which was then granted. Petitioner did not renew its application, but appealed the initial denial. The Ninth Circuit affirmed the denial of intervention, on the basis that the aggregate allocation argument which petitioner sought to interject by way of intervention was foreclosed by *United States* v. *Washington*, *supra*, and *Fishing Vessel*, *supra*. *Hoh Indian Tribe* v. *Baldridge*, 676 F.2d 710 (9th Cir. 1982) (unpublished opinion), cert. denied, No. 82-173 (Oct. 4, 1982).

The instant case was filed by petitioner on July 10, 1981. Petitioner contended that the Secretary managed the ocean fishery in an overly restrictive way, upon an overly expansive interpretation of the tribes' treaty rights. Specifically, in its third cause of action, petitioner alleged that the Secretary's 1981 harvest quota of coho salmon of 620,000 (372,000, or 60%, to the commercial fishery and 248,000, or 40%, to the recreational fishery) was too small, because it would not satisfy nontreaty fishermen's entitlement to one half of the aggregate of all salmon bound for Washington coastal streams. For example, in order to ensure that sufficient numbers of the depressed Hoh River fall coho run would return to give the Hoh tribe an equal harvest share and also provide adequate spawning escapement, the ocean fishery had to be limited to a degree far less (several hundred thousand fish fewer) than would have been necessary to accommodate tribal rights to other, stronger runs. In petitioner's view, the Secretary was wrong to regulate on the premise that the tribes have a right in each run of salmon passing through their respective reservations or usual and accustomed fishing grounds, rather than a right only to a collective equal harvest of the total quantity of treaty fish.

In February 1982, on cross-motions for summary judgment, the district court in the instant case held (Pet. App. 2-3) that the basic river-by-river, run-by-run rule articulated in *Hoh* is not inflexible; but the court rejected petitioner's position as fundamentally inconsistent with *Hoh* and with *United States* v. *Washington*, *supra*, and *Fishing Vessel*, *supra*.[4] On

[4] **The district court below did not dispose of petitioner's first and second causes of action. These were subsidiary claims, alleging certain other flaws in the Secretary's 1981 regulations, and are not at issue here.**

appeal, the Ninth Circuit upheld the district court's ruling (Pet. App. 13-15). The appellate court also rejected petitioner's claims that the optimum yield standard of the Act, 16 U.S.C. 1851(a)(1), required the Secretary to allocate the salmon harvest as it proposed and that the Act impliedly repealed the Stevens treaties (Pet. App. 15-20).

ARGUMENT

Management of the North Pacific anadromous fish resources under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 *et seq.*, presents numerous complex problems, both technical and equitable. The Secretary of Commerce, entrusted by Congress with this responsibility, is engaged in a continuing process of developing a fair and workable management approach, in consultation and cooperation with affected parties and under the continuing jurisdiction of the United States District Court for the Western District of Washington. We do not contend that the 1981 management plan at issue here is perfect in all respects; indeed, significant revisions have been made in subsequent plans with the agreement of affected parties. But we must emphatically disagree that petitioner's proposed approach, in its present form,[5] is either required by law or clearly preferable as a matter of policy, or that the management plan at issue, already reviewed in *Hoh Indian Tribe* v. *Baldrige*, 522 F. Supp. 683 (W.D. Wash. 1981), is outside the scope of the Secretary's discretion under the Act. We submit that further consider-

[5] The precise nature of petitioner's allocation concept was never spelled out in the district court. Petitioner never made clear whether it meant to apportion all species of salmon among all tribes on the basis of numbers of fish, weight of catch, value of catch, or some combination thereof.

ation of this controversy by this Court at this time would serve no useful purpose; rather, the process of negotiations and technical improvements now underway should be permitted to proceed.[6]

1. Petitioner agrees that an allocation system that would guarantee each treaty fishery 50% of each run of fish "would be ideal" (Pet. 10-11).[7] The advantages of a run-by-run allocation system are indeed substantial. Not only does the run-by-run method reduce the need to make adjustments for the differences in value among species and runs of fish, as petitioner observes (Pet. 34 n.15), it may also reduce disparities between tribes and disruptions in the traditional times and places of tribal fishing. An allocation system based on regional aggregates could leave the tribes that have comparatively weaker runs

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[6] The controversy is not technically moot, for the reasons set forth in *United States* v. *Oregon*, 718 F.2d 299 (9th Cir. 1983).

[7] The run-by-run allocation method is consistent with this Court's statement in *Fishing Vessel* (443 U.S. at 679) that

> In our view * * * the treaties * * * secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas.

We do not contend that *Fishing Vessel* mandated that ocean harvest restrictions always be set on the basis of run-by-run allocation or intended to restrict the flexibility of the Secretary and the lower courts to develop equitable methods for implementing the basic principles of fair and equal shares. See 443 U.S. at 685-686; see also *Hoh*, 522 F. Supp. at 688 ("flexibility in the management of fisheries, both in the ocean and in the rivers[,] * * * is necessary in order to make possible the 50-50 sharing result required by law"); *United States* v. *Washington*, 384 F. Supp. at 343 ("precise mathematical equality must give way to more practical means of determining and allocating the harvestable resource, with the methodology of allocation to be developed and modified in light of current data and future experience").

through their usual and accustomed fishing places with significantly less than their fair and equal share of treaty fish.

But like petitioner, the Secretary and the courts have recognized that realities do not permit invariable application of a run-by-run allocation approach. Other factors—the impact on domestic harvest (both treaty and nontreaty), the overriding concern for conservation and replenishment of the resource, the unequal strength of various returning runs, the uncontrollable extrajurisdictional harvest, and the nonfishery related mortality of fish, among others—may necessitate deviations from the "ideal," whether this entails use of limited regional aggregations,[8] river-by-river allocation,[9] aggregation within or among species,[10] or other means.

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[8] The regional aggregate approach was ordered by the court in *United States* v. *Washington*, 459 F. Supp. at 1070, for use in part of the Puget Sound region. The regional aggregate approach guarantees treaty fishermen as a whole their share of harvestable fish, but unless carefully limited does not guarantee each tribe its share, or protect the viability of each usual and accustomed fishing place.

[9] The basic principle of river-by-river allocation was endorsed by the court in *United States* v. *Washington*, 459 F. Supp. at 1070:

> The shares which treaty and nontreaty fishermen are to be accorded the opportunity to harvest shall be calculated on a river-system by river-system basis wherever practical. This shall be based upon the system of origin and shall apply regardless of where the fishery occurs.

A river-by-river allocation guarantees each tribal fishery its share of the total harvestable fish passing by the usual or accustomed fishing place, but does not guarantee that share of each *run* of fish passing through.

[10] The approach adopted by the Secretary pursuant to agreement with the affected tribes and approved by the district

The Secretary's approach to fisheries management takes these realities into account through a continuing process of technical data improvement and negotiation. There can be no doubt that this approach is in accord with the purposes (16 U.S.C. 1801(b)), policy (16 U.S.C. 1801(c)), and standards (16 U.S.C. 1851) of the Act. There is, therefore, no reason to disturb the Secretary's exercise of discretion under the Act.

2. In any event, we submit that petitioner's insistence on an alternative approach is untenable. Petitioner proposes (Pet. 18) "a regional, species aggregate system * * * [that] would adopt a flexible ocean management scheme designed to return enough harvestable fish to the coastal streams so that each coastal Indian fishery could harvest 50% of the overall harvestable fish (by weight, number, or commercial value) subject to its treaty rights." In its current form, this "proposal" is little more than expression of the wish that the complexities of fisheries management would resolve themselves. Petitioner does not suggest how such a "flexible ocean management scheme" would be devised; yet it asks this Court to adopt its proposal in place of an actual working plan (whatever its weaknesses), and thus to supplant the current process of court-supervised negotiation between the Secretary, the State, and the

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court on September 4, 1982, essentially adopts a species-by-species, river-by-river allocation approach. This guarantees each tribal fishery its share of each species that passes through its usual and accustomed fishing place but does not guarantee that share of each run of such species. For example, the harvest from the spring run of coho salmon may be deficient, but the difference compensated for during the autumn run.

affected parties to improve the plan in a responsible and, if possible, mutually acceptable manner.

As matters now stand, petitioner's assurances that its proposal would protect the Indians' treaty rights "without disrupting present, place-specific fishing patterns" (Pet. 19 n.8) cannot be supported in fact. A regional aggregate approach could admittedly protect the rights of treaty fishermen as a whole, but by definition it would not protect the rights of each individual tribe, much less maintain the viability of each usual and accustomed fishing place. It is not debated, for example, that if petitioner's approach had been employed in the 1981 season, the Hoh Tribe would have been left with few if any coho to harvest on the Hoh River, although other tribes might have fared somewhat better.[11]

Given the Indians' right "of taking fish at all usual and accustomed grounds and stations * * * in common with all citizens of the Territory" (Treaty of Olympia, July 1, 1855, art. III, 12 Stat. 972), the court of appeals was correct in holding that "the Stevens treaties preclude adoption of an aggregate approach as the exclusive rule of salmon allocation" (Pet. App. 17).[12] Petitioner is free to propose modifications of the fisheries management plan to the Secretary, and to work with other interested parties toward an

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[11] Petitioner's approach also incorrectly presumes that the entire nontreaty share of the salmon catch must be harvested by ocean fisheries. However, any imbalance in treaty-nontreaty shares could be ameliorated if the State chose to establish fisheries near river mouths to harvest part of the nontreaty share of the stronger runs.

[12] We do not read the court of appeals' opinion to preclude equitable adjustments to, or deviations from, a strict run-by-run allocation system. See Pet. App. 16 & n.6.

equitable solution to this problem. But petitioner has suggested no rule of law that mandates overturning the Secretary's plan in favor of its ill-developed alternative.

3. We agree with petitioner (Pet. 45) that no inconsistency exists between the Act and the Stevens Treaties, and it is therefore not necessary to address in detail the argument (Pet. 46-48) that the Act impliedly abrogated those treaties in part. The Act expressly requires the Secretary's plans to comport with "other applicable law" (16 U.S.C. 1854(a)(1)(A)), which includes treaties. In any event, the Act evinces no explicit intention to abrogate the Stevens Treaties, and therefore should not be held to do so. *Menominee Tribe* v. *United States*, 391 U.S. 404, 412-413 (1968).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR AMICUS CURIAE TRIBES IN OPPOSITION

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The Quileute Indian Tribe, the Hoh Indian Tribe and the Quinault Indian Nation respectfully move this Court for leave to file a brief in opposition to the Washington State Charterboat Association's petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. This motion is based upon the following facts and law.

1. By order of this Court of October 20, 1983, the time for filing the brief in opposition to the petition for writ of certiorari is November 18, 1983.

2. Petitioner seeks to litigate the substance of rights of the movant Quileute, Hoh and Quinault Indian Tribes under the Treaty of Olympia, 12 Stat. 971 (1855). Examination of that interest shows that the tribes are indispensable to the readjudication sought by petitioner.

3. The tribes participated as amicus curiae before the Court of Appeals and the District Court below. Petitioner nevertheless informed counsel for the tribes on November 14, 1983, that it objects to the tribes participation here.

4. The interpretation of the Treaty of Olympia, 12 Stat. 971, and the tribes' substantive rights thereunder, were fully adjudicated in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (1975), cert. denied, 423 U.S. 1086 (1976), substantially aff'd sub nom., Washington v. Washington State Commercial Passenger Fishing Vessel Association, 443 U.S. 658 (1979), (hereafter "Fishing Vessel Ass'n").

5. In Fishing Vessel Ass'n, the petitioner, together with the tribes, the United States, and the State of Washington, fully participated in this

Court's adjudication of the issues again presented in the Association's petition here.

6. The adjudication petitioner seeks would deprive the moving tribes of their right to catch fish at some of their most important, indeed their homeland, river fishing locations.

7. The non-party tribes and the Secretary would still be bound to the Treaty interpretation and run-by-run allocation decrees of United States v. Washington and Fishing Vessel Ass'n. It is impossible to accord complete relief in the absence of the tribes, and the Secretary should be protected by Rule 19(b)(2)(ii), finding himself in a role comparable to that of the "stake-holder" in Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71, 75 (1961) who is not to be compelled "to relinquish [the stake] without assurance that he will not be held liable again

. . . in a suit brought by a claimant who is not bound by the first judgment." Here, the non-party tribes can be expected to make demands on the Secretary to enforce the adjudication of their rights in United States v. Washington and Fishing Vessel Ass'n.

8. Because it is clear that the Association seeks to readjudicate and alter the most important treaty secured rights of the moving tribes—their right to fish at their traditional reservation homeland fishing locations—the tribes should be permitted to participate now as amicus curiae.

Respectfully submitted this 16th day of November, 1983.

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Counsel for Amicus Curiae Tribes

NO. 83-459

IN THE SUPREME COURT

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BRIEF FOR AMICUS CURIAE TRIBES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this petitioner can relitigate matters it presented under a different name in Washington v. Washington State Commercial Passenger Fishing Vessel Association, No. 77-938, 443 U.S. 658 (1979), and whether it is bound by that case.

2. Whether the Court of Appeals erred in determining that the 1854 and 1855 Stevens Treaties between northwest Indian tribes and the United States were not impliedly abrogated by the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA), 16 U.S.C. 1801 et seq.

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OPINION BELOW

The Court of Appeals for the Ninth Circuit issued an opinion reported at 702 F.2d 820 (March 29, 1983).

PARTIES

The petitioner represents a group of non-Indian salmon fishing interests which operates charter services in the recreational fishing industry that has been operating off the Washington coast since the early 1950's. It is the very same Association that was before the Court in another case that bears its different name. Washington v. Washington State Commercial Passenger Fishing Vessel Association, No. 77-983, 433 U.S. 658 (1979) ("Fishing Vessel Ass'n" herein). There is no dispute as to this identity as petitioner admits that it uses the names interchangeably. At page 4 of its brief in Fishing Vessel Ass'n, the Association said:

The opening brief of the petitioner State of Washington contained certain facts applicable to the respondent Washington State Commercial Passenger Fishing Vessel Association ("Charterboat Association") in No. 77-983. The Charterboat Association adopts the State of Washington's statement of the case insofar as applicable.

Respondent is the Secretary of Commerce, who regulates the ocean fisheries under the Magnuson Fishery Conservation and Management Act of 1976 (MFCMA).

Appearing as amicus curiae are three federally recognized Indian tribes with fishing rights secured under a treaty with the United States, the Quinault Indian Nation, the Hoh Indian Tribe, and the Quileute Indian Tribe. Each of these tribes has its own separate fishing grounds on the rivers that run through its own separate reservation

homeland on the north Washington coast. [1]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This case is the third time in five years in which petitioner has come to this Court seeking a different interpretation of the clause in the Stevens Treaties which secured fishing rights to amicus curiae tribes. In 1979 this Court heard the arguments of petitioner (and others) that the interpretation of the Stevens Treaties should be changed from that given by the United States

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[1] Contrary to petitioner's claim at Petition, p. 5, amicus curiae tribes do not have "coterminous" treaty fishing rights. Each tribe's primary fishing grounds are on the rivers that run through their exclusive and distinct reservations. See map of north Washington coast, Appendix 1.

District and Circuit courts in United States v. Washington, 384 F. Supp. 312 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (1975), cert. denied, 423 U.S. 1086 (1976), rehearing denied, 424 U.S. 978 (1976), 459 F. Supp. 1020 (1978), aff'd, 573 F.2d 1123 (1978). This Court, however, affirmed the essentials of the District and Circuit courts' formulation of the tribes' rights.

> In our view the purpose and language of the treaties are unambiguous; they secure the Indians' right to take a share of each run of fish that passes through tribal fishing areas. But our prior decisions provide an even more persuasive reason why this interpretation is not open to question. For notwithstanding the bitterness that this litigation has engendered, the principal issue involved is virtually a "matter decided" by our previous holdings.

Fishing Vessel Ass'n, 443 U.S. at 679 (emphasis added). The Court also considered the Association's claim that these rules should not to apply to the

ocean fisheries. The Court rejected their argument and held instead that the Secretary had a duty to enforce the treaty fishing rights of the Northwest tribes in his regulation of ocean fisheries under the FCMA. Fishing Vessel Ass'n, supra, at 688.

In 1981 amicus curiae tribes sued the Secretary, and the state, to enforce their treaty fishing rights as set forth in Fishing Vessel Ass'n. Petitioner untimely sought intervention to relitigate the underlying interpretation of the treaty, and was denied participation. Hoh Indian Tribe v. Baldrige, 522 F. Supp. 683 (W.D. Wash. 1981). The denial of intervention was affirmed by the Ninth Circuit, which noted that the attempt was a "thinly veiled effort by the Association to relitigate issues that have previously been decided." 676 F.2d 710 (9th Cir. 1982)(memorandum),

cert denied ___ U.S. __, 103 S.Ct. 141, 74 L.Ed2d 120 (1982).

At the same time in 1981 petitioner initiated this separate action against the Secretary to change this Court's interpretation of the Stevens Treaties vis-a-vis the non-Indian ocean fisheries. Petitioner here sought (as it had in Hoh) to replace the "run-by-run" approach with an "aggregate" sharing approach which, although it would disenfranchise some tribes of their traditional fisheries, [2/] would allow the Association's non-Indian members to take a greater share of the total fishery in the ocean.

The District Court heard this case on cross-motions for summary judgment,

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[2/] For example, in 1981 petitioners formulation of sharing would have denied the Hoh Tribe its fishery all together, while some other tribe would have been allowed a greater catch to maintain an "aggregate" sharing balance.

and granted summary judgment in favor of the Secretary. The Court of Appeals affirmed, 702 F.2d 820, re-stating after discussion of the lengthy and repetitive history of this controversy, that "The run-by-run approach for allocating salmon is required by the Stevens treaties and has not been abrogated by the Magnuson Act." Id, at 824.

ARGUMENT

1. The issues raised are res judicata binding on the Association.

Petitioner litigated both the underlying run-by-run sharing standard and the obligation of the Secretary to manage ocean fisheries under the MFCMA in compliance with the Stevens Treaties in Fishing Vessel Ass'n.

The Association also is bound under the principle of parens patriae by the state's participation and representation

of non-Indian interests in the fisheries, including petitioner and other user group associations, in United States v. Washington, supra, and in Hoh, supra. If this were not the case the state (and for the ocean fisheries the Secretary) would find it impossible to regulate non-Indian fisheries in a way that fairly balances the interests of the newer ocean fishing groups, such as petitioner,with the older non-Indian "inside" fishing groups, such as river sports fisheries, and non-Indian gill net fishermen in Puget Sound and coastal harbors. This Court considered the issue in Fishing Vessel Ass'n, saying that such individuals and associations enjoyed "common public rights as citizens of the state, were represented by the state in those proceedings, and, like it, were bound by the judgment." Fishing Vessel Ass'n, supra at 692,

citing Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 340-41 (1958).

2. The MFCMA does not abrogate the Stevens Treaties.

Petitioner also argues that the MFCMA impliedly abrogated the Stevens Treaties. The Association's argument is based on its unique interpretation of the "optimum yield" goal under national standard four of the MFCMA. Petitioner argues that fish caught by amicus curiae tribes in their traditional river fisheries, and by other non-Indian groups fishing the "inside" waters of Washington and other states, somehow do not contribute to the "optimum yield".

Aside from the speciousness of this proposition in its own terms, it ignores the statutory mandate that each fishery management plan of the Secretary shall be consistent with all provisions of the act and with any other applicable law.

16 U.S.C. 1853(a)(1). There is no legislative history which suggests that Congress intended to omit the Stevens Treaties and the federal court decisions interpreting them from the "other law" provision of the Act, and this Court has consistently held that a very clear expression of Congressional intent is required in order to find an abrogation. Menominee Tribe v. United States, 391 U.S. 404 (1968). Moreover, this Court has already decided that the MFCMA requires the Secretary to regulate the ocean to comply with Indian tribes' fishing rights under the treaties. Fishing Vessel Ass'n, supra, at 688.

3. Petitioner has suffered no injustice.

Petitioner has not suffered from the enforcement of amicus curiae tribes rights under the Stevens Treaties.

In 1981, the year for which petitioners brought this case, there was no reduction in petitioner's fishery as a result of the enforcement of amicus curiae tribes' fishing rights by the District Court in Hoh. Instead, they exceeded the catch allocation set for them before Hoh was brought by some 18,000 fish. The tribes' rights were implemented by moderating the state's overly restrictive spawning escapement goals and directing the tribes, the Secretary and the state to develop a plan for the long-term management of the affected fisheries. Hoh, supra, at 690, 692.

Moreover, this year the Secretary provided a larger share of the ocean fishery to the Association. Petitioner and similarly situated recreational

fishing interests were allowed 66% of the ocean catch compared to their historic 40% share. The Secretary's decision was upheld in a case in which petitioner participated. Washington Troller's v. Baldrige and Washington State Charterboat Ass'n, No. C83-753R, in the Western District of Washington, memorandum judgment, August 17, 1983.

There simply is no injustice here that commands another review by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Tribes


VANCOUVER ISLAND
STRAIGHT OF JUAN DE FUCA
LUMMI
Bellingh
SWIN
MAKAH
Lake Ozette
Ozette R.
Hoko R.
Quillayute River System
ELWHA
Port Angeles
Puget Soun
Elwha River
Dungeness R.
QUILEUTE
PORT GAMBLE
PACIFIC OCEAN
Hoh River
HOH
Queets River
Quinault R.
Duckabush R.
QUINAULT
Skokomish R.
Hamma Hamma R.
SKOKOMISH
Tahuya
PUYA
SQUAXON ISLAND
Tacoma
Aberdeen
Chehalis R.
NISQUALLY
Olympia
Deschutes R.

APPENDIX I

NO. 83-459

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1983

WASHINGTON STATE CHARTERBOAT ASSOCIATION,

PETITIONER,

VS.

MALCOLM BALDRIGE, SECRETARY OF COMMERCE,

RESPONDENT.

On Petition for Writ of Certiorari to
the United States Court of Appeals
for the Ninth Circuit

MEMORANDUM IN OPPOSITION TO TRIBES' MOTION FOR LEAVE TO FILE AMICUS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

On September 6, 1983, the Washington State Charterboat Association ("Association") filed and served its Petition for Writ of Certiorari. Citing the "press of business" the Secretary sought and was granted an extension of time to November 18, 1983 to respond to the petition. On November 16, 1983 the government was granted another extension, until December 2, 1983, in which to file its response.

On November 14, 1983, long after the 30 day period provided by this Court's rules for response to a Petition for Writ of Certiorari had expired, the moving tribes sought the Association's consent for them to participate as amici prior to consideration of the Petition for Writ of Certiorari. The Association informed counsel for the tribes that, while it would not object to their participation if certiorari were granted by this

Court, it did object to their participation prior to the Court's action on the Petition for Writ of Certiorari.

On November 17, the tribes filed a motion for leave to file as amici curiae, a brief in opposition and accompanied this motion with a "Brief for Amicus Curiae Tribes in Opposition." This memorandum is supplied in order to formally oppose this motion on the basis that the tribes' participation at this stage would only serve to obfuscate the issues properly before the Court for its determination on whether to grant the Petition. Their brief is simply another in a long line of attempts by the tribes to prevent judicial review of a fisheries allocation format which provides the tribes far more than their fair share of the fish resources subject to the Indian treaty right. The tribes' interest in the outcome of this

case can be fully protected through their participation as amici curiae if and when the case is reviewed on the merits by this Court.

II. ARGUMENT

A. The Motion on Behalf of the Tribes is Disfavored Pursuant to Rule 36 of the Supreme Court Rules.

Rule 36.1 of the Supreme Court rules provides that a motion for leave to file a brief of an amicus curiae prior to consideration of the Petition for Writ of Certiorari is not favored where consent has been refused. The moving tribes have provided no rationale whatsoever for the Court to disregard this general rule disfavoring such motions. Their participation at this stage is not necessary to assure the consideration of their view since, if the writ of certiorari is granted, the Association has already indicated it will not oppose their amici participation if the case is heard on

the merits. The tribes' motion to obtain amici status at this point is simply an attempt to confuse the issues presented by this Petition in the hopes that the Court will not grant review on the merits, and thus deprive the petitioner of an opportunity to have the Court resolve issues critical to the survival of the coastal sports fishing industry, and the social and economic well-being of the coastal communities, of the State of Washington.

This motion and its accompanying brief serve as good examples of the need for the general rule disfavoring such motions. While they never deny that the current allocation format assures that they will be allowed to harvest more than half the salmon stocks subject to the treaty right, the tribes characterize the issues as having already been settled by prior litigation and present the facts in an incorrect or

misleading fashion in a clear attempt to persuade this Court to deny review while the case is in a posture that makes a reply to these contentions very difficult. The general rule disfavoring amicus briefs at this stage was most probably designed to avoid the very type of actions taken by the tribes in this case.

B. The Motion for Amicus Status and the Accompanying Brief Set Forth No Reasons for Believing That Questions of Law or Fact Relevant to the Granting or Denial of the Writ of Certiorari Will Not Be Adequately Presented by the Parties.

Rule 36.3 of the Supreme Court rules provides that motions for leave to file an amicus curiae brief when a case is being heard on the merits by the Court must precisely state the reasons for believing that the amicus applicant's interest will not be protected by the existing parties. The standard

for amicus participation prior to consideration of the Petition for Writ of Certiorari should be at least as strong as indicated by the fact that motions subsequent to granting the writ are not disfavored as are motions made prior to consideration of the Petition. The tribes provide no rationale as to why the Secretary will not adequately protect their interests with respect to whether the writ should be granted. There is, therefore, no reason to believe the interests of the tribes are not adequately represented at this point.[1]

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[1]In paragraph 2 of their motion the tribes do indicate that they are indispensable to the litigation. This, of course, does not mean they are indispensable to the question as to whether the Court should grant the Association's Petition in this case. The Association agrees that the tribes should have a right to participate in review on the merits since their interests are definitely involved in this case. However, it should be pointed out that the tribes have consistently taken the opposite position vis-a-vis the Association. In the case of Hoh v. Baldrige, 522 F. Supp. 683 (W. D. Wash. 1981), the tribes sought to have the 1981 non-Indian ocean fishing season terminated.

C. The Moving Tribes Misstate the Equities in This Case and Misrepresent the Effect That the Association's Requested Relief Would Have.

In their motion for leave to file an amicus brief and the accompanying brief, the tribes repeatedly assert that the Association is seeking to readjudicate and alter the most important treaty secured rights of the moving tribes, said to be their right to fish in their traditional reservation homeland fishing locations.

The tribes assert that acceptance of the Association's position regarding

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In spite of the dramatic adverse impact on the Association's members this relief would have caused, and the fact that the Association moved almost immediately to intervene, the tribes vigorously opposed such intervention. Additionally, it must be noted that the tribes moving for amicus status have continually asserted their sovereign immunity from suit and thus have not been available as parties in litigation by the Association.

allocation could "disenfranchise" some tribes of their traditional fisheries, and, given the 1981 situation, "would have denied the Hoh tribe its fishery altogether, while some other tribe would have been allowed a greater catch to maintain an 'aggregate' sharing balance."

This argument on behalf of the tribes constitutes a misrepresentation of the facts in an effort to portray an inequitable result to the tribes. The Association certainly does not seek to alter the tribes' right to fish at their usual and accustomed fishing grounds.[2] Even though the 1981 situation would have severely limited the Hoh

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[2]It should be noted that the treaties involved in this case secure a right to fish at usual and accustomed fishing grounds, not at a much more limited reservation area. However, the record in this case demonstrates that an aggregation theory as suggested by the Association will not deprive any of the tribes moving for amicus curiae status of their right to fish in usual and accustomed fishing grounds in general or on their reservation.

tribes' fishery on coho salmon, that tribe would have received more than 50% of the other salmon stocks returning to the Hoh river, with an aggregate total of fish caught on the reservation of more than 50% of the harvestable numbers available. In fact, the agreed facts derived from the Secretary's own record upon which this case was tried demonstrate that, under any foreseeable circumstances, each tribe will be able to obtain their aggregate 50% share of the harvest without leaving their own separate reservation fisheries.[3]

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[3]Even if the tribes did occasionally have to leave their reservations to harvest their fair share of the resource, this opportunity is available to them as it was, in fact, their historical approach to fish in a much wider geographic area. Footnote 1 at page 3 of the moving tribes' brief contends that the tribes do not have co-terminus treating fishing rights. This contention is simply incorrect. The decision in U.S. v. Washington which set forth the extent of the usual and accustomed fishing grounds for each of these tribes demonstrates the largely co-terminus nature thereof with each tribe having usual and accustomed fishing grounds

While grossly overstating any effect the Association's proposed method of allocation would have on the tribes, the moving tribes go on to totally misrepresent the impact that the underlying decisions have had on the economic well-being of the Association. It is important to note that the moving tribes nowhere dispute the fact that the run-by-run allocation method currently being used by the Secretary provides them more than 50% of the harvest of fish which would otherwise return to their usual and accustomed fishing grounds and stations. The Association's brief in support of its Petition for Writ of Certiorari sets forth the inequities involved in this unequal sharing. However, the impacts on the

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throughout the north coastal area. U.S. v. Washington, 384 F. Supp. 312, 359, 372-74 (W.D. Wash. 1974).

Association are much greater than those caused by the unequal sharing of coastal stocks. The requirement to stop ocean fishing on other, much stronger stocks in the mixed-stock ocean fishery when necessary to provide a 50% return of the harvestable numbers of the weakest coastal stock to the coastal tribes causes a tremendous loss of ocean harvest on these stronger stocks. While the tribes point out at page 11 of their brief that there was no reduction in the Association's fishery in 1981, that is only because the spawning escapement goals were reduced for that year. Not only does this pose a threat to future harvests, but if an aggregate approach had been utilized with these lowered escapement goals, the Association's harvest in the ocean in 1981 could have been much larger.

In years subsequent to 1981 the Association's season has been dramatically

reduced along with its ocean harvest quota. These reductions have been necessitated by the run-by-run allocation approach dictated by the courts below. The fact, cited by the tribes at pages 11 and 12 of their brief, that the Association was allowed a 66% share of the non-Indian ocean catch this year is totally irrelevant to the harm caused to the Association by the decisions below. The Association's greater share of the non-Indian ocean harvest was unrelated to treaty allocation and is still smaller than the Association's historic 40% share of the harvest that would have been allowed without run-by-run management.

It is simply incongruous for the tribes, after fighting so hard to achieve recognition of their rights to 50% of the harvest, to claim there is no injustice in a situation which denies the non-Indian fisher-

men their rights to at least 50% of the harvest as enunciated by this Court in Washington v. Washington State Commercial Passenger Fishing Vessel Association, 433 U.S. 658 (1979) (hereinafter "Fishing Vessel").

D. The Moving Tribes' Arguments Regarding Res Judicata Are Without Merit and Should Not Be Considered When Determining Whether to Grant the Writ of Certiorari.

The moving tribes, as has been the case in all the prior litigation, have attempted to paint this case as one which has been fully litigated in the past. The tribes made the same arguments regarding res judicata at both the district court and court of appeals levels in this case. Both courts rejected the same.[4]

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[4]The tribes at page 5 of their brief again refer to the Ninth Circuit language that the Association's attempt to intervene in the Hoh v. Baldrige case was a "thinly veiled effort by the Association to relitigate issues that have previously been decided." The tribes fail to mention in

As set forth in the Petition for Writ of Certiorari at pages 22-25, it is simply incorrect that the Fishing Vessel case has previously considered the issues surrounding the relationship between Indian treaty fishing rights and the Fisheries Conservation and Management Act's statutory standards pursuant to which the Secretary is required to regulate the ocean salmon fishery off the coast of Washington. Nor did the court in Fishing Vessel establish an immutable principle relating to harvest allocation necessary to comply with the basic fair share principle established in that case.[5]

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their brief, however, that there was no argument presented on the merits to the Ninth Circuit at that time and thus the Ninth Circuit did not even have the benefit of argument on the issues to be raised by the Association. They also failed to note that the Ninth Circuit did not accept its argument regarding res judicata once the matter was heard on it merits in the case below.

[5]Had it done so, many of Judge Boldt's rulings in U.S. v. Washington which set forth various harvest allocation formats

Even the Secretary admitted in his trial brief below that the issues presented by the Association have not been previously adjudicated.

Even had this Court adjudicated the issues of this case in Fishing Vessel, reconsideration at this time would not be precluded. See Commissioner v. Sunnen, 333 U.S. 591, 599 (1948); Western Oil & Gas Association v. EPA, 633 F.2d 803, 809 (9th Cir. 1980). The Fishing Vessel case dealt with Washington territorial waters and there was no real understanding of how run-by-run management would apply to an ocean fishery. The factual situation regarding the mixed stock ocean fishery has been substantially clarified since the initiation of federal

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based on the particularities of each situation, and were approved in Fishing Vessel, would be in violation of any such specific requirement.

management under the FCMA, and new factual and legal considerations which would justify reconsideration are very apparent. The most important of these considerations is the fact, not denied by the tribes, that run-by-run management, if indeed required by this Court's decision in Fishing Vessel, has proven to result in an unequal sharing of the resource such that the non-Indian fishermen cannot harvest his at least 50% share.

E. The Moving Tribes Misstate the Association's Arguments Regarding Abrogation.

At page 9 of their brief, the moving tribes contend that the Association's argument somehow asserts that fish caught by the amicus curiae tribes in their traditional river fishery or by other non-Indian groups fishing in the "inside" waters of Washington, "somehow do not contribute to the 'optimum yield.'" Again, the tribes are attempting to confuse the issues presented in this case in

order to have the petition denied. A review of the arguments set forth in the Petition at page 41 sets forth the Association's position that it is the extremely large transfers of harvest to foreign fisheries caused by run-by-run allocation in the mixed-stock ocean fishery that constitutes an impermissible variation from the pre-eminent national standard requiring optimum yield to domestic fishermen.

III. CONCLUSION

The tribes' arguments presented in their motion for leave to file an amicus brief and in the accompanying brief are an attempt to divert this Court from the very important issues presented by this case. The motion attempts to avoid review by this Court and thus maintain a patently unfair situation in which the non-Indian fishermen must not only forego a very substantial harvest on

non-treaty stocks but must also provide the tribes much more than 50% of the aggregate of the harvest from stocks subject to the treaty right. The tribes have shown no reason for this Court to vary from the rule disfavoring such motions, and the motion should be denied.

DATED this 28th day of November, 1983.

SYRDAL, DANELO,
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